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**OFFICE OF PETITIONS**

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1940 EAST 6TH STREET - 6TH FLOOR  
CLEVELAND OH 44114

In re Application of :  
Ascher, et. al :  
Application No. 10/510,532 : ON PETITION  
Filed: October 7, 2004 :  
Attorney Docket No. KS4255US :  
(#90711) :

This is a decision on the petition to revive under 37 CFR 1.137(a), filed December 14, 2007.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)". Extensions of time under 37 CFR 1.136(a) are permitted. No fee is required for a renewed petition.

The above-identified application became abandoned for failure to file a reply to the non-final Office action mailed January 25, 2007. This Office action set a shortened statutory period for reply of one (1) month. No reply having been received, the application became abandoned on February 26, 2007. A Notice of Abandonment was mailed on September 14, 2007.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR 1.17(1); and (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable. The instant petition lacks item (3).

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable: "The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."<sup>1</sup>

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the Manual of Patent Examining Procedure, however, does not constitute "unavoidable" delay.<sup>2</sup>

Petitioner asserts that the entire period of delay was unavoidable because the January 25, 2007 Office action was mailed to the address of the first named inventor, rather than the attorney for Applicants. However, the Office properly acted in mailing the January 25, 2007 Office action to the first named inventor. On October 27, 2006, the previous counsel for applicants filed a "Request for Withdrawal as Attorney or Agent and Change of Correspondence Address". On November 28, 2006, the Office mailed a letter approving the request to withdraw as attorney. However, the letter stated that the request to change the correspondence address was not acceptable, as the requested address was not that of (1) the first named signing inventor, or (2) an intervening assignee of the entire interest under 37 CFR 3.71. The Office indicated that all future correspondence would be directed to the first named signing inventor, until otherwise properly notified by applicant. A courtesy copy was

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<sup>1</sup> In re Mattulath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

<sup>2</sup> See Haines, 673 F. Supp. at 317, 5 U.S.P.Q. 2d at 1132; Vincent v. Mossinghoff, 230 U.S.P.Q. 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 U.S.P.Q. 1091 (D.D.C. 1981); Potter v. Dann, 201 U.S.P.Q. 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

directed to attorney Peter Hochberg.<sup>3</sup> The next Office communication mailed was the January 25, 2007 Office action. Thereafter, applicants filed a Power of Attorney and Change of Correspondence Address on February 22, 2007.

As such, the record supports that the January 25, 2007 Office action was properly mailed to the address of the first named inventor.

Alternative Venue and Other Matters:

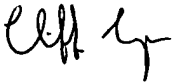
While the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable, petitioner is not precluded from obtaining relief by filing a petition pursuant to 37 CFR 1.137(b) on the basis of unintentional delay. A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by (1) The reply required to the outstanding Office action or notice, unless previously filed; (2) The petition fee as set forth in 37 CFR 1.17(m); and (3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional.

Further correspondence with respect to this matter should be addressed as follows:

By mail:           Mail Stop Petitions  
                  Commissioner for Patents  
                  P.O. Box 1450  
                  Alexandria VA 22313-1450

By FAX:           (571)273-8300  
                  Attn: Office of Petitions

Telephone inquiries related to this decision should be directed to the undersigned at (571)272-3207.



Cliff Congo  
Petitions Attorney  
Office of Petitions

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<sup>3</sup> The Office letter mailed November 28, 2006 was not successfully delivered to the address of the first named inventor, because of insufficient postage. However, there is no indicating that the Office letter mailed January 25, 2007 was returned as undeliverable, as asserted by petitioner.